



## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### 32 CFR Part 2402

#### Implementing the Freedom of Information Act

**AGENCY:** Office of Science and Technology Policy.

**ACTION:** Final rule.

**SUMMARY:** The White House Office of Science and Technology Policy (OSTP), after consideration of the public comments submitted in response to its Notice of Proposed Rulemaking published on October 31, 2018, is amending its regulations to implement the FOIA Improvement Act of 2016. The regulations reflect OSTP's policy and practices and reaffirm its commitment to providing the fullest possible disclosure of records to the public.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Nick Wittenberg, Legal Counsel, OSTP, (202) 456-4444. Questions about the content of this notice may also be sent to [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov).

**SUPPLEMENTARY INFORMATION:** OSTP is amending its regulations governing its implementation of the Freedom of Information Act (FOIA). In 2013, OSTP implemented its FOIA regulations, currently codified at 32 CFR part 2402. The FOIA Improvement Act of 2016, Pub. L. 114-185, requires each agency to review and update its FOIA regulations in accordance with its provisions. Among other things, the FOIA Improvement Act makes changes that require agencies to (1) withhold information only when it is reasonably foreseeable that disclosure would harm an interest protected by an

exemption; (2) allow a minimum of ninety (90) days to file an appeal following an adverse determination; and (3) inform requestors of their right to seek dispute resolution services.

In connection with OSTP's review of its FOIA regulations, OSTP is updating these regulations to clarify OSTP's process for responding to requests for information, incorporate new language on partial disclosures of information, increase the period of time for a requestor to appeal an adverse determination from thirty (30) days to ninety (90) days, and require OSTP to notify requestors of their right to seek dispute resolution services. Due to the scope of the proposed revisions, the new rules will replace OSTP's current FOIA regulations in their entirety. The new rules will reflect statutory changes to the FOIA and improve FOIA-related service and performance, thereby strengthening OSTP's compliance with the FOIA.

On October 31, 2018, OSTP issued a Notice of Proposed Rulemaking seeking comments on the proposed changes to its FOIA regulations. In response, OSTP received one public comment about the proposed rule. The commenter did not suggest any changes to the rule. OSTP, however, decided to make one minor additional change in order to clarify the calculation of fees. In the definition of "direct cost" in § 2402.3(c)(5), OSTP is changing the phrase, "employee or employees" to "personnel" to more accurately reflect the fact that paid, contract, and other staff are used to search for, duplicate, and respond to FOIA requests. For this same reason, OSTP is revising § 2402.9(b) regarding calculation of fees to change the use of the word, "employee(s)," to "personnel."

## **Statutory and Executive Order Reviews**

*Executive Orders 12866 and 13563 – Regulatory Review.*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, Improving Regulation and Regulatory Review, section 1(b), General Principles of Regulation. This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866; accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB). Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OSTP has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

*Paperwork Reduction Act.*

OSTP has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because these regulations do not contain any information collection requirements subject to OMB's approval.

*Executive Order 12988 – Civil Justice Reform.*

These regulations meet the applicable standards set forth in sections 3(a) and 3(b) of Executive Order 12988, Civil Justice Reform.

*Executive Order 13132 - Federalism.*

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OSTP has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*Regulatory Flexibility Act.*

This regulation finalizes the amendments to OSTP's FOIA regulations to incorporate certain changes made by the FOIA Improvement Act of 2016, to reflect developments in case law, and to streamline its procedures. OSTP, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to administrative matters affecting the agency.

*Unfunded Mandates Reform Act of 1995.*

This regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, et seq.

*Small Business Regulatory Enforcement Fairness Act of 1996.*

This regulation is not a major regulation as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. It will not result in

an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*National Environmental Policy Act of 1969.*

OSTP has reviewed this regulation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, and has determined that it will not have a significant effect on the human environment.

#### **List of Subjects in 32 CFR Part 2402**

Freedom of information, Administrative practice and procedure.

For the reasons set forth in the preamble, OSTP revises 32 CFR part 2402 to read as follows:

### **PART 2402—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT**

Sec.

- 2402.1 Purpose and scope.
- 2402.2 Delegation of authority and responsibilities.
- 2402.3 General policy and definitions.
- 2402.4 Procedure for requesting records.
- 2402.5 Responses to requests.
- 2402.6 Timing of responses to requests.
- 2402.7 Confidential commercial information.
- 2402.8 Appeal of denials.
- 2402.9 Fees.
- 2402.10 Waiver of fees.
- 2402.11 Maintenance of statistics.
- 2402.12 Disclaimer.

**Authority:** 5 U.S.C. 552; E.O. 13392, 70 FR 75373, 3 CFR, 2005 Comp., p. 216.

#### **§ 2402.1 Purpose and scope.**

The regulations in this part prescribe procedures by which individuals may obtain access to the Office of Science and Technology Policy's (OSTP) agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, as well as the procedures OSTP must follow in response to requests for records under the FOIA. The regulations should be read together with the FOIA and the Office of Management and Budget's (OMB's) "Uniform Freedom of Information Fee Schedule and Guidelines," which provides information about access to records. All requests for access to information contained within a system of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, shall be processed in accordance with these regulations as well as those contained in 32 CFR part 2403.

**§ 2402.2 Delegation of authority and responsibilities.**

(a) The Director of OSTP designates the OSTP General Counsel as the Chief FOIA Officer and hereby delegates to the Chief FOIA Officer the authority to act upon all requests for agency records and to re-delegate such authority at his or her discretion.

(b) The Chief FOIA Officer shall designate a FOIA Public Liaison, who shall serve as the supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requestor has received following an initial request. The FOIA Public Liaison will be listed on the OSTP website (<https://www.whitehouse.gov/ostp/foia>) and may re-delegate the FOIA Public Liaison's authority at his or her discretion.

(c) The Director establishes a FOIA Requester Service Center that shall be staffed by the Chief FOIA Officer and the FOIA Public Liaison. The contact information for the FOIA Requester Service Center is: Address: Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW, Washington,

DC 20504; Telephone: (202) 456-4444; Fax: (202) 395-1224; E-mail:

[ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov). Updates to this contact information will be made on the OSTP website.

### **§ 2402.3 General policy and definitions.**

(a) *Non-exempt records available to public.* Except for records exempt from disclosure by 5 U.S.C. 552(b) or published in the *Federal Register* under 5 U.S.C. 552(a)(1), OSTP's agency records subject to the FOIA are available to any requester who requests them in accordance with these regulations.

(b) *Record availability on the OSTP website.* OSTP shall make records available on its website in accordance with 5 U.S.C. 552(a)(2), as amended, and other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. To save both time and money, OSTP strongly urges requesters to review documents available on the OSTP website before submitting a request.

(c) *Definitions.* For purposes of this part:

(1) All of the terms defined in the FOIA and the definitions included in OMB's "Uniform Freedom of Information Act Fee Schedule and Guidelines" apply unless otherwise defined in this subpart.

(2) The term *agency record* means a record that is:

(i) Either created or obtained by OSTP; and

(ii) Under OSTP's control at the time the FOIA request is received.

(3) The term *commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation.

OSTP shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSTP has reasonable cause to doubt a requester's stated use, OSTP shall provide the requester a reasonable opportunity to submit further clarification.

(4) The terms *disclose* and *disclosure* refer to making records available, upon request, for examination and copying, or furnishing a copy of records.

(5) The term *direct cost* means those expenditures OSTP actually incurred in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in response to a FOIA request. Direct costs include the salary of the personnel performing the work (i.e., the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses, such as the cost of space, heating, or lighting of the facility in which the records are stored.

(6) The term *duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (e.g., magnetic tape or disk), among others.

(7) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To fall



within this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research.

(8) The term *fee waiver* means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied.

(9) The term *FOIA Public Liaison* means an agency official who is responsible for assisting requesters in defining the scope of their request to reduce processing time, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(10) The term *non-commercial scientific institution* means an institution that is not operated on a commercial basis, as that term is defined in these regulations, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To fall within this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scientific research.

(11) The term *perfected request* means a FOIA request for records that reasonably describes the records sought and has been received by OSTP in accordance with the requirements set forth in § 2402.4.

(12) The terms *representative of the news media* and *news media requester* mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term *news* means information that

is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase by, subscription by, or through free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve, such as through electronic or digital means, such news sources shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(13) The term *requester* means any person, including an individual, partnership, corporation, association, Native American tribe, or other public or private organization, other than a Federal agency that requests access to records.

(14) The term *review* means the process of examining documents located in response to a request that is for a commercial use to determine whether any portion of any document located is permitted to be withheld. It includes the processing of any documents for disclosure -- i.e., doing all that is necessary to excise exempt information and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(15) The term *search* refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line

identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(16) The term *working day* means a regular Federal working day between the hours of 9:00AM and 5:00PM. It does not include Saturdays, Sundays, or legal Federal holidays. Any requests received after 5:00PM on any given working day will be considered received on the next working day.

#### **§ 2402.4 Procedure for requesting records.**

(a) *Format of requests.*(1) *In general.* Requests for information must be made in writing and may be delivered by mail, fax, or electronic mail, as specified in § 2402.2(c). All requests must be made in English. Requests for information may specify the preferred format (including electronic formats) of the response. When a requester does not specify the preferred format of the response, OSTP shall produce scanned records to be delivered electronically.

(2) *Records in electronic formats.* (i) OSTP shall provide responsive records in the format requested if the record or records are readily reproducible by OSTP in that format. OSTP shall make reasonable efforts to maintain its records in formats that are reproducible for the purposes of disclosure. For purposes of this paragraph, the term *readily reproducible* means, with respect to electronic format, a record that can be downloaded or transferred intact to an electronic medium using equipment currently in use by the agency processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt records from nonexempt records may cause the releasable material to be not readily reproducible.

(ii) In responding to a request for records, OSTP shall make reasonable efforts to search for the records in electronic format, except where such efforts would interfere with the operation of the agency's automated information system(s). For purposes of this paragraph, the term *search* means to locate, manually or by automated means, agency records for the purpose of identifying those records that are responsive to a request.

(iii) Searches for records maintained in electronic format may require the application of codes, queries, or other minor forms of programming to retrieve the requested records.

(3) *Attachment restrictions.* To protect OSTP's computer systems, OSTP will not accept files sent as e-mail attachments or as web links. A requester may submit a request by postal mail, by fax, or in the body of the e-mail text.

(b) *Contents.* A request must describe the records sought in sufficient detail to enable OSTP personnel to locate the records with a reasonable amount of effort. To the extent possible, a requester should include specific information that may assist OSTP personnel in identifying the requested records, such as the date, title or name, author, recipient, and subject matter of the record. In general, a requester should include as much detail as possible about the specific records or the types of records sought. Before submitting a request, a requester may contact the OSTP FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records. If, after receiving a request, OSTP determines that it does not reasonably describe the records sought or that the request will be unduly burdensome to process, OSTP shall inform the requester of the additional information that is needed or how the request may be modified. A Requester

attempting to reformulate or modify such a request may discuss their requests with OSTP's FOIA Public Liaison.

(c) *Date of receipt.* A request that complies with paragraphs (a) and (b) of this section is deemed a "perfected request." A perfected request is deemed received on the actual date it is received by OSTP. A request that does not comply with paragraphs (a) and (b) of this section is deemed received when information sufficient to perfect the request is actually received by OSTP.

(d) *Contact information.* A request must contain contact information, such as the requester's phone number, e-mail address, or mailing address, to enable OSTP to communicate with the requester about the request and provide released records. If OSTP cannot contact the requester, or the requester does not respond within 30 calendar days to OSTP's requests for clarification, OSTP will administratively close the request.

(e) *Types of records not available.* The FOIA does not require OSTP to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that OSTP must notify the requester of the destruction or disposal of the requested records.

#### **§ 2402.5 Responses to requests.**

(a) *In general.* In determining which records are responsive to a request, OSTP will ordinarily include only records in its possession as of the date it begins its search for records. If any other date is used, OSTP shall inform the requester of that date.

(b) *Authority to grant or deny requests.* OSTP shall make initial determinations to grant or deny, in whole or in part, a request for records.

(c) *Granting of requests.* When OSTP determines that any responsive records shall be made available, OSTP shall notify the requester in writing and provide copies of the requested records in whole or in part. Records disclosed in part shall be marked or annotated to show the exemption(s) applied to the withheld information and the amount of information withheld unless doing so would harm the interest protected by an applicable exemption. If a requested record contains exempted material along with nonexempt material, all reasonably segregable material shall be disclosed.

(d) *Adverse determinations.* If OSTP makes an adverse determination denying a request in any respect, it must notify the requester of that adverse determination in writing. Adverse determinations include decisions that: the requested record is exempt from disclosure, in whole or in part; the request does not reasonably describe the records sought, but only if, after discussion with the FOIA Public Liaison, the requester refuses to modify the terms of the request; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester; denials involving fees or fee waiver matters; and denials of requests for expedited processing.

(e) *Content of adverse determinations.* Any adverse determination issued by OSTP must include:

(1) A brief statement of the reason(s) for the adverse determination, including any FOIA exemption applied by the agency in denying access to a record unless such inclusion would harm the interest protected by an applicable exemption;

(2) An estimate of the volume of any records or information withheld, such as the number of pages or other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(3) A statement that the adverse determination may be appealed under § 2402.8 of this subpart and a description of the appeal requirements; and

(4) A statement notifying the requester of the assistance available from OSTP's FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services.

(f) *Consultations, referrals, and coordinations.* When OSTP receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If OSTP determines that it is best able to process the record in response to the request, then it shall do so. If OSTP determines that it is not best able to process the record, then it shall proceed in one of the following ways:

(1) *Consultation.* When records originating with OSTP contain information of interest to another Federal agency, OSTP should typically consult with that Federal agency prior to making a release determination.

(2) *Referral.* (i) When OSTP believes that a different Federal agency is best able to determine whether to disclose the record, OSTP should typically refer the responsibility for responding to the request regarding that record to that agency.

Ordinarily, the agency creating the record is presumed to be the agency best able to determine whether the record should be disclosed. If OSTP and another Federal agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever OSTP refers any part of the responsibility for responding to a request to another agency, OSTP must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral.

(iii) After OSTP refers a record to another Federal agency, the agency receiving the referral shall make a disclosure determination and respond directly to the requester. The referral of a record is not an adverse determination and no appeal rights accrue to the requester therefrom.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which a referral would be made could harm an interest protected by an applicable exemption, such as an exemption that protects personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party is not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion into the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an



Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could harm national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, OSTP will coordinate with the agency that created the record to seek its views on disclosure of the record. OSTP will then notify the requester of the disclosure determination for the record that is the subject of the coordination.

**§ 2402.6 Timing of responses to requests.**

(a) *In general.* OSTP shall ordinarily respond to requests in order of their receipt.

(b) *Initial determinations.* OSTP will exercise all reasonable efforts to make an initial determination acknowledging and granting, partially granting, or denying a request for records within twenty (20) working days after receiving a perfected request.

(c) *Extensions of response time in “unusual circumstances.”* (1) The twenty (20)-working day period provided in paragraph (b) of this section may be extended if unusual circumstances arise. If an extension is necessary, OSTP shall promptly notify the requester of the extension, briefly state the reasons for the extension, and estimate when a response will be issued. Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the

request or among two or more components of the agency having substantial subject-matter interest therein.

(2) After OSTP notifies the requester of the reasons for the delay, the requester will have an opportunity to modify the request or arrange for an alternative time frame for completion of the request. To assist in this process, OSTP shall advise the requester of the availability of OSTP's FOIA Public Liaison to aid in the resolution of any disputes between the requester and OSTP, and notify the requester of his or her right to seek dispute resolution services from the Office of Government Information Services.

(3) If no initial determination is made at the end of the twenty-day period provided for in paragraph (b) of this section, including any extension provided for in paragraph (c)(1) of this section, the requester may appeal the action to the FOIA Appeals Officer.

(d) *Expedited processing of request.* (1) A requester may make a request for expedited processing at any time.

(2) When a request for expedited processing is received, OSTP must determine whether to grant the request for expedited processing within ten (10) calendar days of its receipt. Requests will receive expedited processing if one of the following compelling needs is met:

(i) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. As a matter of administrative discretion, OSTP may waive the formal certification requirement.

(4) Administrative appeals of denials of expedited processing will be given expeditious consideration. If the FOIA Appeals Officer upholds the denial of expedited processing, that decision is immediately subject to judicial review in the appropriate Federal district court.

(e) *Multi-track processing.* (1) OSTP may use multi-track processing in responding to requests. Multi-track processing means placing simple requests that require limited review in one processing track and placing more voluminous and complex requests in one or more other processing tracks. Requests in each track are processed on a first-in, first-out basis.

(i) *Track one – expedited requests.* Track one is made up of requests that sought and received expedited processing as provided for in paragraph (d)(2) of this section.

(ii) *Track two – simple requests.* Track two is for requests of simple to moderate complexity that do not require consultations with other entities and do not involve voluminous records.

(iii) *Track three – complex requests.* Track three is for complex requests that involve voluminous records, require lengthy or numerous consultations, raise unique or novel legal questions, or require submitter review under § 2402.7.

(2) OSTP may provide requesters with requests in slower track(s) the opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of faster track(s). OSTP will do so by contacting the requester by letter, telephone, e-mail, or facsimile, whichever is more efficient in each case. When providing a requester with the opportunity to limit the scope of a request, OSTP shall also advise the requester of OSTP's FOIA Public Liaison to aid in the resolution of any dispute arising between the requester and OSTP as well as the requester's right to seek dispute resolution services from the Office of Government Information Services.

(f) *Aggregating requests.* OSTP may aggregate requests if it reasonably appears that multiple requests, submitted either by a single requester or by a group of requesters acting in concert, involve related matters and constitute a single request that otherwise would involve unusual circumstances. For example, OSTP may aggregate multiple requests for similar information filed by a single requester within a short period of time.

#### **§ 2402.7 Confidential commercial information.**

(a) *In general.* Business information obtained by OSTP from a submitter will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity from whom OSTP directly or indirectly obtains confidential commercial information. The term includes corporations; State, local, and tribal governments; universities; non-profit organizations; associations; and foreign governments.

(c) *Designation of business information.* Either at the time of submission or at a reasonable time thereafter, a submitter of business information will use good-faith efforts to designate, by appropriate markings, any portions of its submission that it considers to be protected from disclosure under 5 U.S.C. 552(b)(4). These designations will expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* OSTP shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(e) *Where notice is required.* Notice shall be given to a submitter whenever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) OSTP has reason to believe that the information may be protected from disclosure under 5 U.S.C. 552(b)(4).

(f) *Opportunity to object to disclosure.* OSTP will allow a submitter reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter must provide a detailed written statement of objections. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of information withheld under 5 U.S.C. 552(b)(4), the submitter must demonstrate the reasons the submitter believes the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to adequately respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that OSTP does not receive within the time specified shall not be considered by OSTP. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* OSTP shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSTP determines that disclosure is appropriate over the objection of a submitter, OSTP shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose, which shall include:

- (1) A statement of the reason(s) why each of the submitter's objections to disclosure was not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) OSTP determines that the information should not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987;

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such a case, OSTP shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information, but no opportunity to object will be offered; or

(5) The information requested was not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless OSTP has substantial reason to believe that disclosure of the information would result in competitive harm.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSTP shall promptly notify the submitter.

(j) *Notice to requesters.* Whenever OSTP provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSTP shall also notify the requester(s). Whenever OSTP notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSTP shall also notify the

requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSTP shall notify the requester(s).

#### **§ 2402.8 Appeal of denials.**

(a) *Right to administrative appeal.* A requester has the right to appeal to the FOIA Appeals Officer any adverse determination.

(b) *Notice of appeal.* (1) *Time for appeal.* To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted no later than ninety (90) calendar days after the date of the initial adverse determination or after the time limit for response by OSTP has expired. Prior to submitting an appeal, the requester must pay in full any outstanding fees associated with the request.

(2) *Form of appeal.* An appeal shall be initiated by filing a written notice of appeal. The notice shall specify the tracking number assigned to the FOIA request by OSTP and be accompanied by copies of the original request and adverse determination. To expedite the appellate process and give the requester an opportunity to present his or her arguments, the notice should contain a brief statement of the reason(s) why the requester believes the adverse determination to be in error. Requesters may submit appeals by mail or electronically. If sent by regular mail, appeals shall be sent to: Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW, Washington, DC 20504. Appeals sent via electronic mail shall be submitted to [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov). Updates to this contact information will be made on the OSTP website. To facilitate handling, the requester should mark both the appeal letter and envelope, if submitted by mail, or subject line of the transmission, if submitted electronically, with “Freedom of Information Act Appeal.”



(c) *Decisions on appeals.* The FOIA Appeals Officer shall make a determination in writing on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within twenty (20) working days after the receipt of the appeal. If the denial is wholly or partially upheld, the Chief FOIA Officer shall:

(1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)-(G); and

(2) Notify the requester that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740, E-mail: [ogis@nara.gov](mailto:ogis@nara.gov), Telephone: 202-741-5770, Facsimile: 202-741-5769, Toll-free: 1-877-684-6448.

(d) *Dispute resolution services.* Dispute resolution is a voluntary process. If OSTP agrees to participate in the dispute resolution services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking judicial review of OSTP's adverse determination in Federal district court, a requester generally must first submit a timely administrative appeal.

#### **§ 2402.9 Fees.**

(a) *Fees generally required.* OSTP shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. OSTP shall

charge fees in accordance with paragraph (b) of this section unless fees are waived or reduced in accordance with § 2402.10.

(b) *Calculation of fees.* In general, fees for searching, reviewing, and duplication will be based on the direct costs of these services, including the average hourly salary (basic pay plus 16% for benefits) of the personnel conducting the search, reviewing the records for exemption, or duplicating the records. Charges for time less than a full hour will be in increments of quarter hours.

(1) *Search fees.* Search fees may be charged even if responsive documents are not located or are located but withheld on the basis of an exemption. However, search fees shall not be charged or shall be limited as follows:

(i) *Educational, scientific, or news media requests.* No search fee shall be charged if the request is not sought for a commercial use and is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.

(ii) *Other non-commercial requests.* No search fee shall be charged for the first two hours of searching if the request is not for a commercial use and is submitted by an entity that is not an educational or scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media.

(iii) *Requests for records about oneself.* No search fee shall be charged to search for records performed under the terms of the Privacy Act, 5 U.S.C. 552a(f)(5).

(2) *Review fees.* Review fees shall be assessed only with respect to those requesters who seek records for a commercial use. A review fee shall be charged for the initial examination of documents located in response to a request to determine whether

the documents may be withheld from disclosure and for the redaction of document portions exempt from disclosure. Records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such subsequent review are also assessable.

(3) *Duplication fees.* Records will be photocopied at a rate of ten cents (\$0.10) per page. For other methods of reproduction or duplication, OSTP will charge the actual direct costs of producing the document(s). Duplication fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.

(c) *Aggregation of requests.* When OSTP determines that a requester, or a group of requesters acting in concert, is attempting to evade the assessment of fees by submitting multiple requests in place of a single, more complex request, OSTP may aggregate any such requests and assess fees accordingly.

(d) *Fees likely to exceed \$25.* If total fee charges are likely to exceed \$25, OSTP shall notify the requester of the estimated amount to be charged. The notification shall offer the requester an opportunity to confer with the FOIA Public Liaison to reformulate the request to meet the requester's needs at a lower cost. OSTP may administratively close a submitted FOIA request if the requester does not respond in writing within thirty (30) calendar days after the date on which OSTP notifies the requester of the fee estimate.

(e) *Advance payments.* Fees may be paid upon provision of the requested records, except that payment may be required prior to that time if the requester has previously failed to pay fees or if OSTP determines that the total fees will exceed \$250. When payment is required in advance of the processing of a request, the time limits prescribed

in § 2402.6 shall not be deemed to begin until OSTP has received payment of the assessed fees. If the requester has previously failed to pay fees or charges are likely to exceed \$250, OSTP shall notify the requester of the estimated cost and:

(1) Obtain satisfactory assurance from the requester, in writing, of full payment;

or

(2) OSTP may require the requester to pay the full amount of any fees owed or make an advance payment of the full amount of OSTP's estimated charges.

(3) If OSTP does not receive an adequate response, assurance, or advance payment within thirty (30) calendar days of a fee determination or notification issued under the authority of this section, OSTP will administratively close the corresponding request.

(f) *Other charges.* OSTP will recover the full costs of providing services, such as those enumerated below, when it elects to provide them:

(1) Certifying that records are true copies; and

(2) Sending records by special methods, such as express mail.

(g) *Remittances.* Remittances shall be made either via personal check or bank draft drawn on a bank in the United States, or by postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue NW, Washington, DC 20504. Updates to this contact information will be made on the OSTP website.

(h) *Receipts and refunds.* OSTP will provide a receipt for fees paid upon request. OSTP will not refund fees paid for services actually rendered.

#### **§ 2402.10 Waiver of fees.**

(a) *In general.* OSTP shall waive part or all of the fees assessed under § 2402.9 if, based upon information provided by a requester or otherwise made known to OSTP, the disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations or activities and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis. To determine whether a fee waiver requirement is met, OSTP shall consider the following factors:

(1) Disclosure of the requested information would shed light on the operations or activities of the Federal Government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information already in the public domain, in either the same or a substantially similar form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's

ability and intention to effectively convey information to the public must be considered.

OSTP will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OSTP will consider the following criteria:

(i) OSTP will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters are encouraged to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, OSTP will determine whether that is the primary interest furthered by the request. OSTP will ordinarily presume that when a news media requester has satisfied the conditions in paragraphs (a)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Data brokers or others who merely compile and market government information for direct economic return will not receive the benefit of this presumption.

(b) *Timing of fee waivers.* A request for a waiver or reduction of fees should be made when a request for records is first submitted to the agency and should address the criteria referenced in paragraph (a) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date of the fee waiver request was received.

(c) *Clarification.* Where OSTP has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, OSTP may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

(d) *Restrictions on charging fees.* Except as described in paragraphs (c)(1) through (3) of this section, if OSTP fails to comply with the FOIA's time limits for responding to a request, it may not charge search fees. In addition, subject to the exceptions set forth in paragraphs (c)(1) through (3) of this section, if OSTP does not comply with the FOIA's time limits for responding to a request, it may not charge duplication fees when records are not sought for a commercial use and the request is made by an educational institution, non-commercial scientific institution, or representative of the news media.

(1) If OSTP determines that unusual circumstances, as defined by the FOIA, apply and provides timely written notice to the requester in accordance with the FOIA, then a failure to comply with the statutory time limit shall be excused for an additional ten (10) days.

(2) If OSTP determines that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, then OSTP may charge search fees and duplication fees, where applicable, if the following steps are taken. OSTP must:

(i) Provide timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

(ii) Discuss with the requester via postal mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(3) If a court determines that exceptional circumstances exist, as defined by the FOIA, then a failure to comply with the statutory time limits shall be excused for the length of time provided by the court order.

**§ 2402.11 Maintenance of statistics.**

(a) OSTP shall maintain records sufficient to allow accurate reporting of FOIA processing statistics, as required under 5 U.S.C. 552(e) and all guidelines for the preparation of annual FOIA reports issued by the Department of Justice.

(b) OSTP shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report compiling the statistics maintained in accordance with paragraph (a) of this section for the previous fiscal year. A copy of the report will be available for public inspection on the OSTP website.

**§ 2402.12 Disclaimer.**

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Dated: October 5, 2020

Stacy Lynn Murphy

Operations Manager



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